

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

ANGIODYNAMICS, INC., *

Plaintiff, *

-v- 17-cv-598 *

C.R. BARD, INC., et al., *

Defendants. *

TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE CHRISTIAN F. HUMMEL
March 16, 2020
445 Broadway, Albany, New York

FOR THE PLAINTIFF:

BOIES, SCHILLER AND FLEXNER, LLP.
BY: Philip Iovieno, Esq. (via teleconference)
Anne Nardacci, Esq.
Jack Dew, Esq.
30 South Pearl Street
Albany, New York 12207

FOR THE DEFENDANT:

O'MELVENY, MYERS LAW FIRM
BY: Edward Moss, Esq.
Colleen Powers, Esq.
7 Times Square
New York, New York 10036

AngioDynamics v C.R. Bard - 17-cv-598

1 COURT CLERK: The case is AngioDynamics, Inc.,
2 versus C.R. Bard, Inc., et al., docket number 17-cv-598.

3 Appearances for the record, please.

4 MR. IOVIENO: For the plaintiff, we have
5 Philip Iovieno for Boies, Schiller and Flexner. I'm
6 here with my colleagues Anne Nardacci and Jack Dew.

7 THE COURT: Good morning, Counselors.

8 MR. IOVIENO: Good morning, your
9 understanding.

10 MR. MOSS: Good morning, your Honor. For the
11 defendants, it's Edward Moss from O'Melveny. My
12 colleague Colleen Powers is here as well. As I was
13 explaining earlier, Ms. Powers has not yet filed her
14 admissions papers but we were informed that it was okay
15 for her to sit in.

16 THE COURT: It is.

17 MR. MOSS: Thank you, your Honor.

18 THE COURT: Good morning, Ms. Powers. Good
19 morning, Mr. Moss.

20 Mr. Iovieno, as a practical matter, could you
21 hear Mr. Moss?

22 MR. IOVIENO: I could. When I speak, there's
23 a bit of an echo so I will just try to speak slowly but
24 I can hear everything just fine. Thank you.

25 THE COURT: Good morning. I'm just going to

Lisa L. Tennyson, CSR, RMR, FCRR
UNITED STATES DISTRICT COURT - NDNY

AngioDynamics v C.R. Bard - 17-cv-598

1 put on the record what has transpired, and we will try
2 to address the myriad of issues which you presented this
3 morning.

4 Docket No. 73 is a text order which I issued
5 directing that all discovery be completed by March 12th
6 of 2020 and that motions be filed by April 2nd of 2020.
7 The Court set those deadlines in effort to have this
8 matter trial ready for Judge Sannes by September
9 because, among other reasons, if the case is not tried
10 in September, it will go on Judge Sannes' list of
11 reported case that are pending more than three years.

12 Docket No. 83 is a letter from defense counsel
13 raising an issue that the plaintiffs have failed to
14 comply with Rule 26 in their disclosure and
15 specifically, objecting to a February 12th, 2020,
16 supplemental response served by plaintiff and which,
17 according to the defendants, they identified for the
18 first time 75 hospitals where there may be potential
19 witnesses to testify in this matter.

20 Docket No. 84 is a response from plaintiff's
21 counsel which, among other things, asks for an
22 opportunity to file a more detailed response to Docket
23 No. 83.

24 Docket No. 86 is a detailed response from
25 plaintiff's counsel indicating their position that they,

Lisa L. Tennyson, CSR, RMR, FCRR
UNITED STATES DISTRICT COURT - NDNY

AngioDynamics v C.R. Bard - 17-cv-598

1 among other things, have complied with Rule 26, and that
2 this, in their view, is just yet another attempt by
3 defendants to seek depositions beyond those which the
4 Court has previously allowed.

5 Docket No. 87 is a request by defense counsel
6 to file certain portions of their letter of March 11th,
7 2020, under seal. Docket No. 88 is a yet another letter
8 forwarded to the Court regarding these ongoing discovery
9 disputes. Docket No. 89 is a letter from plaintiff's
10 counsel asking to file a response to Docket No. 88.

11 Docket No. 91 is a letter from plaintiff's
12 counsel advising the Court that there's a new discovery
13 dispute which was further addressed in Docket No. 92.
14 It appears that the dispute has arisen regarding seeking
15 discovery regarding C3 wave technology.

16 Docket No. 93 is a letter indicating that a
17 dispute has arisen regarding taking the testimony of
18 testimony of at least three witnesses. The plaintiff
19 wishing to have those witnesses deposed by video and the
20 defendants seeking them to do them in person. Docket
21 No. 95 is another letter regarding that dispute.

22 Mr. Iovieno, if I start with you, rather than
23 Mr. Moss, Mr. Moss indicates for the first time you have
24 indicated that there are potentially 75 hospitals from
25 which you may seek to call people to testify at the time

Lisa L. Tennyson, CSR, RMR, FCRR
UNITED STATES DISTRICT COURT - NDNY

AngioDynamics v C.R. Bard - 17-cv-598

1 of trial and I guess my question is: At what point in
2 this process do you intend to advise Mr. Moss and
3 Ms. Powers who you actually intend to call?

4 MR. IOVIENO: So, your Honor, first of all,
5 the hospital that we identified in our initial
6 disclosures were simply just conforming initial
7 disclosures for the same exact hospitals we had
8 disclosed in July last year and October of last year.
9 Same exact hospitals that Mr. Moss made a motion on in
10 September of last year seeking more depositions, which
11 you gave him some limited relief; he chose not to
12 disclose any of those hospitals in September.

13 THE COURT: I guess, Mr. Iovieno, let me stop
14 you there. At any point in time have you advised
15 Mr. Moss whom you intend to produce at trial to testify
16 regarding these issues?

17 MR. IOVIENO: Well, your Honor, we --

18 THE COURT: Mr. Iovieno, this is going to go
19 much more quickly if you respond to my questions rather
20 than speechifying.

21 So let me ask you again: At what point in
22 time do you intend to advise Mr. Moss of those folks who
23 you intend to call to testify at the trial of this
24 matter in front of Judge Sannes?

25 MR. IOVIENO: When there is a trial witness

Lisa L. Tennyson, CSR, RMR, FCRR
UNITED STATES DISTRICT COURT - NDNY

AngioDynamics v C.R. Bard - 17-cv-598

1 list that is submitted and exchanged between the
2 parties, we will list our witnesses at that point. Your
3 Honor, we --

4 THE COURT: Mr. Iovieno, when is he entitled
5 to depose these people, then?

6 MR. IOVIENO: Your Honor, it will come --
7 he -- we will not be -- no one on our trial witness list
8 will not be someone that we identify in discovery.

9 THE COURT: Who have you identified for each
10 of these 75 hospitals who is going to testify at trial?
11 If you have done that, I have missed that in your
12 letters when I looked at this yesterday.

13 MR. IOVIENO: Okay. Let me just say, first of
14 all, it's not 75, it's 25.

15 THE COURT: I'm just reading from Mr. Moss's
16 letter of March 3rd of 2020 in which he indicates that
17 your interrogatory responses name 75 hospitals. Let's
18 stop there for a moment.

19 Mr. Moss, you've represented to the Court as
20 an attorney that they identified 75 hospitals. Is that
21 correct or incorrect?

22 MR. MOSS: Your Honor, I believe what I
23 represented to the Court is that there are 75 hospitals
24 combined that were identified in our interrogatories and
25 in their interrogatories.

Lisa L. Tennyson, CSR, RMR, FCRR
UNITED STATES DISTRICT COURT - NDNY

AngioDynamics v C.R. Bard - 17-cv-598

1 THE COURT: That's not particularly clear from
2 your letter.

3 MR. MOSS: Okay. But if you -- I apologize
4 for that, your Honor, but let me clarify. They say in
5 their supplemental initial disclosure we have added to
6 our disclosure any witness who was identified on Bard's
7 supplemental interrogatory responses or AngioDynamic's
8 supplemental.

9 Ms. Powers actually did the work and -- and
10 looked at all of those lists and deduced, because they
11 didn't give us names. They just referred to --

12 THE COURT: How many new hospitals?

13 MR. MOSS: There are 75 total hospitals.

14 THE COURT: You as well should probably listen
15 to my question.

16 How many new hospitals did the plaintiffs
17 identify in their February 12th, 2020, response?

18 MR. MOSS: Your Honor, I'm sorry --

19 THE COURT: Again, Mr. Moss, I'm reading from
20 your letter. Why don't you take out Docket No. 83.

21 MR. MOSS: Okay, your Honor. This is
22 the March 11th letter?

23 THE COURT: No, it's the March 3rd letter, I
24 believe.

25 MR. MOSS: Okay.

Lisa L. Tennyson, CSR, RMR, FCRR
UNITED STATES DISTRICT COURT - NDNY

AngioDynamics v C.R. Bard - 17-cv-598

1 THE COURT: March 3rd. On March 3rd it
2 appears to -- at least to me, that your office filed a
3 letter, which is Docket No. 83, which is four pages in
4 length, which is signed by you, Mr. Moss.

5 MR. MOSS: Yes.

6 THE COURT: In it, if you look at paragraph
7 2 -- excuse me -- paragraph 3, beginning with the words
8 "together."

9 MR. MOSS: Yes.

10 THE COURT: Together those interrogatory
11 responses name 75 hospitals. My question simply is: My
12 reading of your letter, which apparently is incorrect,
13 is that plaintiff's counsel has recently identified 75
14 hospitals. Mr. Iovieno says they have identified 25
15 hospitals in their most-recent response.

16 My question simply is: On February 12th of
17 2020 AngioDynamics served supplemental initial
18 disclosures. Did they identify 75 new hospitals or 25
19 new hospitals?

20 MR. MOSS: They identified exactly what's in
21 the block quote above and nothing more. They identified
22 representatives of each of the hospitals identified
23 in -- that's all they identified.

24 THE COURT: Then it says in supplemental
25 responses to Bard's interrogatories. I apologize if I'm

Lisa L. Tennyson, CSR, RMR, FCRR
UNITED STATES DISTRICT COURT - NDNY

AngioDynamics v C.R. Bard - 17-cv-598

1 being unclear. Did they identify a number of new
2 hospitals?

3 MR. MOSS: All they did was identify -- they
4 said look at all of the old initial -- look at our
5 interrogatory responses, look at your interrogatory
6 responses, and we may call any one of those hospitals
7 that appears on several lists in those interrogatory
8 responses.

9 THE COURT: So these are not new named
10 hospitals but hospitals that are garnered for their
11 earlier interrogatory response and your response?

12 MR. MOSS: Correct, your Honor.

13 THE COURT: How many of those hospitals were
14 identified by you and how many of them were identified
15 by them?

16 MR. MOSS: I believe we identified -- I think
17 Mr. Iovieno has this in his letter. I think it's about
18 20 -- 15 or 20 that we did and the rest were theirs.

19 THE COURT: Mr. Iovieno, you said you recently
20 identified 25 hospitals. Where did that number come
21 from?

22 MR. IOVIENO: Hang on one second.

23 THE COURT: Take your time, Counselor.

24 MR. IOVIENO: Your Honor, it was 25 hospitals
25 and there are several different lists but on this issue

Lisa L. Tennyson, CSR, RMR, FCRR
UNITED STATES DISTRICT COURT - NDNY

AngioDynamics v C.R. Bard - 17-cv-598

1 that Mr. Moss is talking about, there's 25 hospitals.

2 THE COURT: So as of February 12th of 2020,
3 you identified 25 new hospitals or are these hospitals
4 that have previously been disclosed?

5 MR. IOVIENO: No new hospitals, 25 -- what we
6 did is conform our initial disclosures to what was
7 previously disclosed. No new hospitals.

8 THE COURT: Is that your understanding,
9 Mr. Moss, or is it different?

10 MR. MOSS: No. All that they disclosed in
11 their initial disclosures was this block quote. They
12 didn't give any list. They just referred us to the
13 supplemental responses to our and their interrogatory
14 responses. We had to count them up and there were 75.
15 If he's now saying, well, it's only the ones we produced
16 in response to interrogatory number 3 or number 4, maybe
17 that's what Mr. Iovieno is saying now, and that would be
18 a start towards narrowing this.

19 THE COURT: Is that what you're saying,
20 Mr. Iovieno, or are you saying something different?

21 MR. IOVIENO: No, that is exactly what we're
22 saying, your Honor.

23 MR. MOSS: But it wasn't in the letter so we
24 don't know which --

25 THE COURT: So now that we have made that --

Lisa L. Tennyson, CSR, RMR, FCRR
UNITED STATES DISTRICT COURT - NDNY

AngioDynamics v C.R. Bard - 17-cv-598

1 so now you're identifying 25 hospitals which you are
2 putting the defendants on notice you may call witnesses
3 from. Is that correct, Mr. Iovieno?

4 MR. IOVIENO: Correct. Yes. The same
5 hospitals we had previously identified, we are just
6 confirming our initial --

7 THE COURT: Mr. Iovieno, if you could just
8 once during the rest of my tenure here answer one of my
9 questions directly, that would be appreciated.

10 My question simply is, Counselor: Have you
11 now limited the potential pool of hospitals from whom
12 you may call a witness to 25? Is that correct?

13 MR. IOVIENO: Correct.

14 THE COURT: All right. And when do you
15 anticipate advising them of the name of the witnesses
16 who you may call?

17 MR. IOVIENO: Your Honor, our intent was at
18 the time when the trial witness lists are exchanged
19 between the parties. We say in our letter, if you look
20 on page 3 of our letter, we cite the case law where it
21 says very clearly that initial disclosures, you just
22 need to identify the corporate name. We do not need to
23 identify the names.

24 Now, at the end of the day, there are multiple
25 names of these different hospitals. The most efficient

Lisa L. Tennyson, CSR, RMR, FCRR
UNITED STATES DISTRICT COURT - NDNY

AngioDynamics v C.R. Bard - 17-cv-598

1 way, if Mr. Moss had wanted to depose any of these
2 hospitals, would be to simply issue a corporate
3 representative deposition for the person most
4 knowledgeable at the hospital and they would have put it
5 up.

6 We do not disclose names because it would be
7 multiple names but the hospitals -- the key thing -- and
8 that's what the case law cannot be any more clear in
9 saying, it's cited right in our letter.

10 THE COURT: So, Mr. Iovieno, you think it's
11 all right if you wait until you file your witness list
12 three weeks before trial to tell them who you are going
13 to call? Is that what you're telling me?

14 MR. IOVIENO: No, no, no. Not at all, your
15 Honor.

16 THE COURT: Well, when do you plan on telling
17 them, Counselor?

18 MR. IOVIENO: Your Honor, the names of the
19 hospitals are the ones we identified. If you are
20 talking about the name -- the specific name of the
21 individual at the hospital --

22 THE COURT: That's correct. That's what I'm
23 talking about. The people who you actually intend to
24 clearly call into court and put in the witness chair.

25 MR. IOVIENO: Your Honor, let me just say

Lisa L. Tennyson, CSR, RMR, FCRR
UNITED STATES DISTRICT COURT - NDNY

AngioDynamics v C.R. Bard - 17-cv-598

1 quickly, I will directly respond. That the case law we
2 cited --

3 THE COURT: Mr. Iovieno, if that's your idea
4 of directly responding, we clearly have different ideas.
5 If you are trying to try my patience, Mr. Iovieno,
6 you're gone pretty far down that road and let me make it
7 clear to you, Counselor, that's not something you want
8 to do.

9 So let's try one more time for you to try to
10 answer one of my questions.

11 When do you intend to tell them the specific
12 people you intend to call to testify in the trial in
13 front of Judge Sannes?

14 MR. IOVIENO: Our intent was a specific person
15 from the hospital would be disclosed, if we used them
16 and if this issue was still alive after summery
17 judgment, when they exchange trial witness lists. If
18 you'd rather name from each hospital, I will disclose
19 them now. It's not a problem to do it.

20 THE COURT: Don't you think like the purpose
21 of the federal rules it would prevent surprise at trial?
22 You are going to call a witness, they will have no idea
23 what their testimony is going to be.

24 MR. IOVIENO: If it's the hospital, your
25 Honor. It's not the name of the individual, the

Lisa L. Tennyson, CSR, RMR, FCRR
UNITED STATES DISTRICT COURT - NDNY

AngioDynamics v C.R. Bard - 17-cv-598

1 hospital --

2 THE COURT: Mr. Iovieno, clearly -- clearly I
3 don't have your skills as an attorney, and I understand
4 my limitations, but I clearly didn't think you wanted to
5 call a physical building in here to testify. I assumed
6 you were going to call an individual.

7 You know, let's do this the hard way.

8 Do you want to make a motion of some kind,
9 Mr. Moss, with respect to this?

10 MR. MOSS: Yes, I'm happy to, your Honor.

11 THE COURT: What kind of motion do you want to
12 make?

13 MR. MOSS: I want to make a -- well, a motion
14 to compel them to tell us which individual witnesses
15 they're going to call.

16 THE COURT: When do you want to file your
17 motion?

18 MR. MOSS: And if they don't do that, to
19 preclude.

20 THE COURT: When do you want to file your
21 motion by?

22 MR. MOSS: Can we have a week, your Honor?

23 THE COURT: You can have two weeks.

24 MR. MOSS: Okay. Thank you.

25 THE COURT: We are in the middle of a

Lisa L. Tennyson, CSR, RMR, FCRR
UNITED STATES DISTRICT COURT - NDNY

AngioDynamics v C.R. Bard - 17-cv-598

1 pandemic.

2 MR. IOVIENO: Your Honor, can I just be heard
3 for one second?

4 THE COURT: No. You've been heard and you've
5 been absolutely unhelpful, Mr. Iovieno. You've done
6 nothing but obstruct and refuse to answer my questions.

7 This is a self-inflicted wound. I was trying
8 to move the matter forward toward trial. You clearly
9 don't want to do that, so we are going to do it this
10 way.

11 MR. IOVIENO: I was just going to say --

12 THE COURT: Mr. Iovieno, when I tell you not
13 to speak, do not speak. Do you understand that,
14 Counselor?

15 MR. IOVIENO: Yes, your Honor.

16 THE COURT: You will file your motion by
17 April 3rd.

18 MR. MOSS: Sure, your Honor. That's fine.
19 Thank you.

20 THE COURT: Mr. Iovieno, you will file your
21 response by April 17th. I also understand we have a
22 dispute regarding some discovery you want to conduct,
23 Mr. Moss. Is that true?

24 MR. MOSS: That is correct, your Honor.

25 THE COURT: When do you want to file your

Lisa L. Tennyson, CSR, RMR, FCRR
UNITED STATES DISTRICT COURT - NDNY

AngioDynamics v C.R. Bard - 17-cv-598

1 motion with respect to that issue?

2 MR. MOSS: We can do it on the same day.

3 THE COURT: File your motion regarding the
4 other issue --

5 MR. MOSS: C3 wave issue.

6 THE COURT: I'm sorry?

7 MR. MOSS: The C3 wave issue? Is that the
8 issue?

9 THE COURT: Yes, the C3 wave issue.

10 MR. MOSS: Yes, your Honor.

11 THE COURT: File your motion to compel by
12 April 3rd.

13 MR. MOSS: That's fine, your Honor. Thank
14 you.

15 THE COURT: And you will file your responses
16 by April 17th. The other dispute is you want to do some
17 depositions in person?

18 MR. MOSS: Yes, your Honor, or we want to --
19 or we want a 30-day continuance.

20 THE COURT: That's denied. You can do that by
21 video. We are in the middle of a pandemic, Counselor.
22 The fact that you are here this morning in person shows
23 remarkably bad judgment, in my view. The depositions
24 will be done by video.

25 Anything else you want to address this

Lisa L. Tennyson, CSR, RMR, FCRR
UNITED STATES DISTRICT COURT - NDNY

AngioDynamics v C.R. Bard - 17-cv-598

1 morning, Mr. Moss?

2 MR. MOSS: No, your Honor. We do believe that
3 we would --

4 THE COURT: Mr. Moss, that issue has been
5 resolved. If you are unhappy with it, take an appeal to
6 the District Court Judge. Judge Sannes will be happy to
7 hear from you, I'm certain. Anything else you want to
8 address?

9 MR. MOSS: I do not.

10 THE COURT: Mr. Iovieno, anything else you
11 want to address this morning?

12 MR. IOVIENO: I would make more point on the
13 demand but if you don't want to hear it, I will not.

14 THE COURT: We are all done here. You have a
15 good day. We're done.

16 MR. IOVIENO: Thank you, your Honor.

17 MR. MOSS: Thank you, your Honor.

18 THE COURT: Yes.

19 (Proceeding concluded)

20 * * * * *

21

22

23

24

25

Lisa L. Tennyson, CSR, RMR, FCRR
UNITED STATES DISTRICT COURT - NDNY

~~AngioDynamics v C.R. Bard - 17-cv-598~~

C E R T I F I C A T I O N

I, Lisa L. Tennyson, RMR, CSR, CRR, Federal
Official Realtime Court Reporter, in and for the United
States District Court for the Northern District of New
York, do hereby certify that pursuant to Section 753,
Title 28, United States Code, that the foregoing is a
true and correct transcript of the stenographically
reported proceedings held in the above-entitled matter
and that the transcript page format is in conformance
with the regulations of the Judicial Conference of the
United States.

Lisa L. Tennyson, RMR, RPR, FCRR

Lisa L. Tennyson, CSR, RMR, FCRR
UNITED STATES DISTRICT COURT - NDNY